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No. 87-2117

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMESBURY CORP.,

Petitioner,

v.

LITTON INDUSTRIAL PRODUCTS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Jamesbury's "Question Presented For Review" misconstrues the decision below. The Federal Circuit never held that a party cannot cross-appeal if it won below. The Federal Circuit merely, and properly, held that the fact that Litton did not cross-appeal from the denial of a directed verdict motion on its laches and estoppel defenses, when it was fully exonerated by the jury decision on another defense, did not preclude the district court, on remand, from ruling on a summary judgment motion brought by Litton on the laches and estoppel defenses.

Thus, aside from the threshold question of whether this case is certworthy, the only real question presented here is whether Jamesbury is entitled to yet another hearing on its contention that the district court abused its discretion in deciding the summary judgment motion on remand even though the directed verdict motion on the same issue had been denied during the trial.

STATEMENT PURSUANT TO COURT RULE 28.1

Pursuant to Court Rule 28.1, respondent Litton Industrial Products, Inc. states that it is a fully owned subsidiary of Litton Industries, Inc.

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I. STATEMENT OF THE CASE

Jamesbury's statement of the case obscures the issues raised by this petition. Accordingly, Litton has restated the facts for the Court's assistance.

Jamesbury filed this suit in February of 1976—more than twelve years after it became aware that Litton's predecessor was manufacturing the products later accused of infringement and only eighteen months before the patent was to expire. Litton immediately moved to dismiss on the grounds of laches and estoppel. Because both parties presented affidavits and other facts outside the pleadings, the district court treated Litton's motion as one for summary judgment. In February of 1977, the district court denied the motion on the ground that there existed disputed issues of fact. *Jamesbury Corp. v. Litton Industrial Products.*, 427 F. Supp. 756 (D. Conn. 1977). Since the motion was one for summary judgment, the court made no affirmative findings of fact but rather simply resolved disputes in Jamesbury's favor. Thus, for example, on the issue of notice to Litton's predecessor, the court ruled as follows:

> Resolving all ambiguities and disagreements in favor of the party against whom summary judgment is sought, I find that plaintiff has at least presented a question of fact as to whether its 1967-68 actions were sufficient notice of Jamesbury's intention not to acquiesce in any infringement and so overcome a defense of laches in this case.

427 F. Supp. at 758-59. (Citation omitted.)

Following seven years of discovery and pretrial motions, the parties conducted a jury trial on all issues in September of 1983. At the close of the evidence, Litton made several motions for a directed verdict, one of which was a motion for a directed verdict on its laches and estoppel defenses. The judge denied each of these motions and sent the case to the jury.

The jury then found the patent invalid. The judge had earlier instructed the jury not to decide any of the other issues, including laches and estoppel, if it found the patent invalid. Accordingly, the jury reached no other issue. On appeal, the Federal Circuit reversed the invalidity judgment and remanded the case for further proceedings.

Because the facts underlying Litton's laches and estoppel defenses presented at trial were undisputed, Litton then brought a motion for summary judgment on these defenses. In accordance with local rules, Litton specifically identified 26 undisputed facts as grounds for the judgment. In its counterpart statement, Jamesbury did not dispute any of those facts. Instead, Jamesbury merely contended that the court had previously held that there existed disputed issues of fact as to three issues. On November 5, 1986, the district court entered summary judgment in favor of Litton on both laches and estoppel.

In responding to Jamesbury's argument that the earlier denial of the directed verdict motion established the law of the case, the district court ruled the denial could not be held to have conclusively addressed the arguments raised by the summary judgment motion. More specifically, the court noted the Second Circuit rule that " 'it is in the best interests of efficient judicial administration for the trial judge

to refrain from considering a motion for a directed verdict in favor of deciding a motion for judgment n.o.v.' " (citing *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 166 n. 2 (2d Cir. 1980). [App. A at 27a] The court also noted the Second Circuit rule that " 'on a renewed motion for summary judgment . . . the law of the case is not a limit on the court's jurisdiction, but a rule of practice which may be departed from in the sound discretion of the district court' " (citing *Corporacion de Mercadeo Agricola v. Mellon Bank International*, 608 F.2d 43, 48 (2d Cir. 1979), and *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131 (2d Cir.), *cert. dismissed*, 325 U.S. 883 (1956). [App. A at 28a]

Jamesbury appealed. On appeal, the Federal Circuit affirmed the district court decision. In responding to Jamesbury's law of the case argument, the Federal Circuit noted that the law of the case is a judicially created doctrine, and concurred with the district court that, at the trial level, the doctrine is little more than a management practice to permit logical progression toward judgment. [App. A at 10a] As to Jamesbury's argument that the district court erred because it did not consider the "crucial fact" that Litton failed to cross appeal the denial of the directed verdict, the Federal Circuit responded that failure to appeal had no effect because Litton could not have cross-appealed for either of two reasons. First, there was no judgment on the laches issue, and, second, Litton was not adversely affected by the invalidity judgment. [App. A at 10a] The Federal Circuit also concurred with the defendant's view that the denial of the directed verdict motion did not conclusively determine the issues in the motion because of the preference in favor

of granting a judgment n.o.v. over a directed verdict. [App. A at 11a]

II. ARGUMENT

A. This Case Does Not Raise Issues That Warrant Granting The Writ

This case presents no reviewable issues for this Court. Petitioner's grounds for appeal to this Court hinge solely upon alleged errors in the lower court decisions. This case presents no conflicts between jurisdictions, no constitutional questions, and no questions of major importance. The district court had the discretionary power to decide the summary judgment motion even though a directed verdict motion on the same defenses had been denied earlier. Petitioner is asking this Court to second guess the district court's exercise of discretion and to have a second hearing on the issue. That, however, is not the role of this Court. "[Certiorari] jurisdiction was not conferred upon this Court merely to give the defeated party in the circuit court of appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

B. The Federal Circuit Correctly Ruled That Failure To Cross-Appeal Had No Bearing On The Law Of The Case

Jamesbury's entire argument turns on its contention that Litton should have appealed the denial of the directed verdict motion that Litton made during the trial. Jamesbury argues that the Federal Circuit erred in stating that Litton could not have appealed this denial because there was no judgment on the laches and estoppel issues and because Litton was not

adversely affected by the judgment. The Federal Circuit, however, did not err in these statements.

Litton could not have appealed the denial of the directed verdict because there was no final decision on the laches and estoppel issues. Only final decisions and specified interlocutory orders, not including denials of a directed verdict motion, are appealable. 28 U.S.C. §§ 1291, 1292. The denial of a directed verdict motion is not a final decision because it is "subject to a later determination of the legal questions raised by the motion" in the form of a judgment n.o.v. Fed. R. Civ. P. 50(b). Moreover, because the jury never reached the laches and estoppel defenses, these issues were not part of the judgment. Thus, no appeal was available from the entry of judgment on the verdict which, in this case, decided only the validity issue in Litton's favor. *Cf. DMI, Inc. v. Deere & Co.*, 802 F.2d 421 (Fed. Cir. 1986) (cross-appeal from a jury verdict of infringement dismissed because no judgment was entered on that verdict).

Furthermore, the judgment fully exonerated Litton and, therefore, there was no adverse judgment from which Litton could take an appeal. The law is well settled that, ordinarily, only a party aggrieved by a judgment may exercise the statutory right to appeal therefrom. *Perez v. Ledesma*, 401 U.S. 82 (1971); *Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); *New York Telephone Co. v. Maltbie*, 291 U.S. 645 (1934); *Corning v. Troy Iron & Nail Factory*, 56 U.S. 451 (1854). The exception to this rule occurs where the decree contains an unnecessary finding that is adverse to the successful party. *See, e.g., Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939). Here, however, there was no

adverse finding because the jury never reached the laches and estoppel defenses. Thus, the exception does not apply to this case.

The one case cited by Jamesbury in support of its contrary position is *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). That case, however, is inapposite. *Montgomery Ward* addressed the question of whether the grant of a judgment n.o.v. under Federal Rule of Civil Procedure 50(b) effected an automatic denial of an alternative motion for a new trial. 311 U.S. at 249-250. The case at bar involves neither a motion for judgment n.o.v. nor a motion for a new trial. In *Montgomery Ward*, this Court merely held that an appellee may cross-appeal for a new trial because of errors of law when an appellant seeks review of a judgment n.o.v. 311 U.S. at 254. Those facts have nothing to do with the question of whether Litton could have appealed the denial of its directed verdict motion.

Even assuming, *arguendo*, that the Federal Circuit misspoke on this issue, however, Jamesbury has not demonstrated why the outcome of this case should be any different. The district court never suggested that Litton could not have cross-appealed from the denial of the directed verdict. The district court merely ruled that the law of the case did not prevent it from exercising its discretion to decide the summary judgment motion. The law is overwhelmingly in support of this proposition.

Contrary to Jamesbury's contentions, the law of the case ordinarily applies only where there has been a final judgment and not to interlocutory rulings. *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 199 (1950). Even if Litton could

have cross-appealed as Jamesbury suggests, the law of the case would not apply because clearly Litton was not obligated to cross-appeal. *Id.*[1]

At the trial court level, the doctrine of law of the case "is little more than a management practice to permit logical progression toward judgment." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.404[1] (2d ed. 1984). Here, the grant of summary judgment was consistent with a logical progression toward judgment. The posture of the case was very different when Litton brought its second summary judgment motion than when the original summary judgment motion was denied in 1976. Seven years of discovery and a full trial had taken place. Denial of the directed verdict motion at trial was proper because judgments n.o.v. are preferred over

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[1] Unlike the instant case, the cases cited by Jamesbury all involved final judgments or decisions by appellate courts. In *Fogel v. Chestnutt*, 668 F.2d 100 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982), the Second Circuit had earlier ruled on liability and, on appeal from the determination of damages, refused to reconsider liability as a result of an intervening Supreme Court case. In *Doe v. New York City Department of Social Services*, 709 F.2d 782 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983), the Second Circuit, in earlier reversing and remanding a case, ruled that a jury question existed on a liability issue and later reversed a judgment n.o.v. on the ground that the earlier decision precluded the district court from overturning the jury verdict. In *Central Soya Co. v. George A. Hormel & Co.*, 723 F.2d 1573 (Fed. Cir. 1983), the Tenth Circuit had decided liability before the creation of the Federal Circuit, and the Federal Circuit, in its review of the later damage determination, refused to reconsider liability issues. Thus, the standards cited from these cases by Jamesbury regarding when one can set aside the law of the case are not applicable to Litton's summary judgment motion.

directed verdicts in jury cases so that the jury verdict will be preserved for appeal. Following remand after reversal of the jury's invalidity holding, Litton renewed its motion for summary judgment in an effort to avoid an unnecessary second trial.

In the face of such logical progression, courts have willingly entered summary judgment after having earlier denied summary judgment or a directed verdict. The leading case in the Second Circuit on this issue is Judge Learned Hand's opinion in *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131 (2d Cir.), *cert. dismissed*, 352 U.S. 883 (1956). In *Dictograph*, as in this case, the renewed summary judgment motion was before a different judge than the first motion. Under a previous Second Circuit case, the second judge had been bound by the first decision. *Dictograph* overruled this earlier case. As Judge Hand explained:

> [T]here is no imperative duty to follow the earlier ruling - only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs.

230 F.2d at 135. Judge Hand went on to state that the consideration of a renewed summary judgment motion was a matter "of discretion." 230 F.2d at 136.

A more recent Second Circuit case has defined the standard governing consideration of such later filed motions as a balancing test between the need for finality against the forcefulness of any new evidence and the demands of justice. In *Corporacion de-Marcadeo Agricola v. Mellon Bank International*, 608 F.2d 43, 48 (2d Cir. 1979), the court stated the test as follows:

> On appeal, CMA argues that Judge Cannella's denial of Mellon's first motion for summary judgment became the law of the case barring Judge Leval from later granting a similar motion. In *Dictograph Products Company v. Sonotone Corporation*, 230 F.2d 131 (2d Cir. 1956), we set forth the standard which governs consideration of such a motion. We held that on a renewed motion for summary judgment before a second judge, the district court must balance the need for finality against the forcefulness of any new evidence and the demands of justice. With respect to a non-appealable denial of summary judgment, the law of the case is not a limit on the court's jurisdiction, but a rule of practice which may be departed from in the sound discretion of the district court. The first judge always has the power to change a ruling; further reflection may allow a better informed ruling inaccordance with the conscience of the court. *A fortiori*, if the first judge can change his mind after denying summary judgment, and change his ruling, a second judge should have and does have the power to do so as well.

The court went on to uphold the summary judgment. *See also Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983) (court first denied defendant's motion for judgment n.o.v. but awarded a new trial and granted a directed verdict motion on "very similar evidence" at the retrial).

Contrary to Jamesbury's contention, the denial of the directed verdict motion at trial was consistent

with a view that the laches and estoppel issues could be resolved by a later filed motion as a matter of law. The Second Circuit recommends that a judge refrain from granting a directed verdict motion in favor of consideration of a judgment notwithstanding the verdict. *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 166 n.2 (2d Cir. 1980). Thus, even if the district court had believed that the laches and estoppel defenses could have been resolved in Litton's favor as a matter of law, it properly deferred ruling until a motion for judgment n.o.v. In this case, however, Litton never filed such a motion because it received a dispositive invalidity judgment in its favor, and the jury did not reach the laches and estoppel issues.

In short, the district court's decision to grant the second summary judgment motion was a matter within its discretion. Moreover, the earlier denial of the directed verdict motion at trial does not suggest that the district court abused that discretion. Thus, regardless of whether Litton could or could not have appealed that denial, the district court acted within its discretion.

III. CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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